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OCTOBER TERM, 1982

HARRY'S HARDWARE, INC.

Petitioner

VERSUS

JAMES C. PARSONS, SUPERINTENDENT OF POLICE, ET AL

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

May the Louisiana Legislature constitutionally promulgate a Sunday Closing Law scheme by mandating that all places of public business be closed on Sunday, while some types of businesses are exempted from that general prohibition.

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STATEMENT OF THE CASE

On March 7, 1980, Harry's Hardware, Inc. filed suit in Civil District Court for the Parish of Orleans, State of Louisiana, against James C. Parsons as Superintendent of Police for the City of New Orleans and Harry Connick as District Attorney for Orleans Parish, State of Louisiana, seeking to enjoin the enforcement of Louisiana Revised Statute 51:191 to 194, commonly termed the "Sunday Closing Law."

The City of New Orleans filed an exception of lack of jurisdiction over the subject matter alleging that a civil in-

junction cannot lie against a criminal statute unless, *inter alia*, that statute was manifestly unconstitutional. The State of Louisiana joined in that exception and urged the district court to find the statute constitutional.

The district court denied plaintiff's application for a preliminary injunction and dissolved its temporary restraining order. In his Reasons for Judgment, Judge Sanford Levy held that Louisiana's Sunday Closing Law was not manifestly unconstitutional and, therefore, an injunction of the criminal statute could not issue.

Shortly after that judgment was rendered, plaintiff, Harry's Hardware, Inc., applied to the Fourth Circuit Court of Appeal for the State of Louisiana for supervisory writs, which were denied.

Plaintiff then appealed to the Fourth Circuit Court of Appeal, Louisiana's intermediate appellate body. On May 19, 1981, a five judge panel of that court rendered its opinion and declared Louisiana's Sunday Closing Statute (R.S. 51:191-194) unconstitutional and remanded the matter to the district court for issuance of a permanent injunction.

The State of Louisiana appealed that court's decision to the Louisiana Supreme Court. On January 25, 1982, that court rendered its opinion and by a four to three margin held Louisiana's Sunday Closing Law constitutional.

SUMMARY OF ARGUMENT

A. Louisiana's Sunday Closing Law does not violate the Equal Protection Clause of the Fourteenth Amendment because that statute seeks to achieve a legitimate state object by utilizing a rationally related means to achieve that end.

B. The different treatment accorded hardware stores does not constitute invidious and unlawful discrimination.

C. Louisiana's Sunday Closing Law is a proper exercise of the state's police power and legislative prerogative.

ARGUMENT

A. Louisiana's Sunday Closing Law Does Not Violate the Equal Protection Clause of the Fourteenth Amendment Because That Statute Seeks to Achieve a Legitimate State Object by Utilizing a Rationally Related Means to Achieve That End.

The objective of Louisiana's Sunday Closing Law is clearly stated at La.R.S. 51:194(C):

> "the purpose of this section being to promote the health, recreation and welfare of the people of this state and to prevent unfair competition among persons, firms or business establishments..."

Louisiana's courts have interpreted that objective consistently and in light of its plain meaning. In

Louisiana v. Scallon, 374 So.2d 1232 (La. 1979), the Louisiana Supreme Court held:

> "In rejecting the contention similar to the present that the Sunday Closing Law denies due process and equal protection to owners of a business so regulated, the courts have consistently held that a Sunday Closing regulation such as here attacked is a reasonable governmental restriction of business operations legislatively enacted in the health, recreation and welfare of the working population. *McGowan v. State of Maryland*, 366 U.S. 420; *State v. Weiner*, 161 So.2d 755; see also *City of New Orleans v. Dukes*, 427 U.S. 297."

The validity of this objective has not been subject to dispute in these proceedings as a valid exercise of police power. Courts at every level in all parts of the country have recognized a legislature's authority to mandate a forced day of rest.

> "The courts recognize the validity of Sunday statutes as civil, municipal, or police regulations, and also that the state has the power to provide a weekly respite from all labor, (*Hennington v. Georgia*, 163 U.S. 299) and at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation, and tranquility. (*Braunfield v. Brown*, 366 U.S. 599; *McGowan v. Maryland*, 366 U.S. 420. The need to provide for one day of rest at periodic intervals has been recognized by legislative enactments, both state and federal (*Land v. McFadden*, 66 So.2d 83, *Rogers v. State*, 4 So.2d 918), and the adoption of such laws has been uniformly recognized as a legitimate exercise of the police power." 73 *American Jurisprudence* 786.

The question, therefore, becomes whether or not the classifications utilized by the statute are wholly irrelevant to the achievement of the statute's legitimate objective.

The statute enacted in 1886 provides at R.S. 51:191 that:

> "All stores, shops, saloons, and all places of public business, licensed under the law of Louisiana or under any parochial or municipal law and all plantation stores, shall be closed at twelve o'clock on Saturday nights, and remain closed continuously for twenty-four hours, during which time no proprietor thereof shall give, trade, barter, exchange or sell any of the stock or any article of merchandise kept in his establishment."

The rule of the Louisiana Sunday Closing Law is that *all* businesses must close their doors on Sunday. This statutory requirement is followed by the vast majority of business operations in the State of Louisiana. There has been no evidence to the contrary that the exceptions to this rule have become broader and more extensive than the rule itself. The law is clear that a party seeking to have a statute declared unconstitutional bears the burden of proving the infirmity that renders the law void. Petitioner has not substantiated at the trial court that most of Louisiana's work force is actively engaged in their employment on Sunday or that most businesses operate on Sunday, as the petitioner did in *Caldar's v. Bedding Bard, Inc.*, 417 A.2d 343 S.Ct. of Conn., 1979, see p. 353, where the Connecticut Supreme Court found that state's Sunday

Closing Law unconstitutional. The petitioner's failure to prove that Louisiana's law is not rationally related to a legitimate state objective vindicates the constitutionality of La.R.S. 51:191 et seq.

The Louisiana legislature, in its wisdom and utilizing its legislative prerogatives, has determined that to satisfy the purpose of the Sunday Closing Law and to provide for the health and welfare of the general public, it must also allow certain business operations to remain open on Sunday while mandating that most must be closed.

Consequently, at R.S. 51:192 the statute provides that the prohibition is inapplicable to, *inter alia*, news dealers, restaurants, drugstores, railroads, public and private markets, hotels, theaters, or any place of amusement. The list of exemptions was expanded somewhat by the Louisiana legislature in 1972 and 1977 when it stated that medical supplies may be purchased as well as items for funeral or burial purposes, the sale of realty or mobile homes, and created a special exemption for the Vieux Carre.

Despite the few exemptions created by statute to the mandated closing, appellee has never proved nor can substantiate that most businesses operate on Sundays to such an extent that the purpose of the Sunday Closing Law, to provide a forced day of rest for the majority of Louisiana's working population, has been overwhelmed by the exceptions created to it. Without a doubt the classifica-

tion of the great preponderence of business operations as non-exempt activities is a classification rationally related to the objective of guaranteeing a day of rest for the majority of Louisiana citizens.

Because the means employed by the statute to achieve a legitimate state interest are rationally related to that end, the classifications created are not violative of petitioner's equal protection rights. This court has penned this principle on multiple occasions, as in *McGowan v. Maryland*, 366 U.S. 420, 6 L.Ed. 393 81 S.Ct. 1101 (1961):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classifications rests on grounds wholly irrelevant to the achievement of the states' objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

This principle was amply supported by this honorable court's holding in *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513 (1976):

> "Unless a classification tramples fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or

> alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."

Petitioner has never alleged that Louisiana's legislative scheme creates a suspect class of "hardware stores and has not evidenced or argued that the statute tramples a "fundamental personal right." Consequently the test applicable is that of mere "rationality". The Louisiana statute in question abundantly satisfies that test.

B. The Different Treatment Accorded Hardware Stores Does Not Constitute Invidious and Unlawful Discrimination.

Although petitioner is treated differently from exempt retail outlets permitted to operate on Sunday, that treatment is not as harsh and extensive as petitioner would have the court believe.

Petitioner has framed its "Question presented for Review" in its Petition for Certiorari in such a manner to lead the court to conclude that petitioner substantiated at trial that most of the items constituting the stock in trade of hardware stores were sold on Sundays by drug and grocery stores open on that day. A review of the affidavits indicates that such proof was not submitted to the trial court or placed in evidence. Petitioner has failed to carry its burden of proof in vindicating the unconstitutional nature of the laws in question.

Indeed the opposite of what petitioner asserts is true. Harry's Hardware is a traditional hardware outlet with most of its stock constituting lumber or building supply materials, home or office furnishings and household or business appliances. These items are specifically prohibited from sale on Sunday by any type of outlet (see La.R.S. 51:194A). Consequently even if Harry's Hardware were permitted to open on Sunday, it would not be permitted to offer for sale the majority of its stock.

There is no doubt that hardware stores are treated differently from drugstores in the eyes of Louisiana's Sunday closing statute. This different treatment does not, however, constitute discrimination of such an unreasonable and invidious nature as to render the statute constitutionally infirm. Not every discrimination promulgated by statute is unconstitutional.

> "It is well settled that 'the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution.' *Williams v. Rhodes*, 1968, 393 U.S. 23. Thus, as a general rule, a law is not violative of Fourteenth Amendment, *despite the existence of discrimination in the technical or broad sense*, where the law at issue maintains some rational connection with a legitimate state interest." *Farbush v. Wallace*, 341 F.Supp. 217, 1971. (Emphasis supplied.)

By its very nature, a law must treat one class or type of persons differently from another class of persons and therefore "discriminate". The question at issue is whether

or not the statute invidiously discriminates or discriminates in an unreasonable and unjustifiable manner against hardware stores. This Honorable Court in *Williams v. Rhodes, supra*, Justice Black writing for the Court, held that:

> "It is true that this Court has firmly established the principle that the equal protection clause does not make every minor difference in the application of laws to different groups a violation of our constitution. But we have also held many times that invidious distinctions cannot be enacted without a violation of the equal protection clause. In determining whether or not a state law violates the equal protection clause, we must consider the facts and circumstances behind the law, the interest which the state claims to be protecting, and the interests of those who are disadvantaged by the classification. *Carrington v. Rash*, 380 U.S. 89 (1965). See also *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 408 U.S. 920 (1973)"

In *Rinaldi v. Yeagear*, 384 U.S. 305 (1966), this Honorable Court held that

> "To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The constitution does not require things which are different in fact...to be treated in law as though they were the same'."

Clearly, hardware stores are treated differently from grocery or drugstores because they *are different*. They are primarily engaged in the sale of building materials, specifi-

cally prohibited by Louisiana's Sunday Closing Law, while drug and grocery outlets are primarily engaged in their separate and distinct enterprises.

If a Sunday Closing Law exists and is a valid exercise of the state's police power even petitioners would hopefully concede that certain types of stores should remain open while most close. Clearly it is a legislative determination to ascertain which stores are to be open and which closed. The fact that Louisiana's legislature decided that hardware stores shall be closed while grocery stores remain open does not constitute an invidious and unreasonable discrimination against hardware outlets.

C. Louisiana's Sunday Closing Law is a Proper Exercise of the State's Police Power and Legislative Prerogative.

Clearly, the Louisiana legislature has ascertained that the Sunday Closing Law is necessary for Louisiana and that the exceptions promulgated to the general shutdown rule are also necesary to provide for the health, welfare and recreation of the public on Sunday. This legislative option and prerogative should not be interfered with by the courts. This Honorable Court in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), held that

> "When local economic regulation is challenged solely as violating the equal protection clause, this court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, e.g., *Lee Lehn Hausen v. Lakeshore Auto Parts Co.*, 410 U.S.

> 356 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economics under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. ... In short the judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. E.g., *Daybright Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act which cannot stand consistently with the Fourteenth Amendment. *Ferguson v. Skrupa*, 372 U.S. 726 (1963)."

The exemptions created by the statute are those that the legislature felt were justified to safely provide for the welfare of the public while mandating a forced closing of most businesses. The legislature exempted restaurants and public markets because people need to procure food on Sunday; they exempted drugstores because people need to procure drugs and other medical supplies on Sunday; they exempted funeral houses because people cannot avert the inevitability of death on Sunday; they exempted hotels because out-of-town visitors need someplace to reside; they exempted theaters because the opening of theaters is consistent with providing a day of rest and recreation; they

exempted newspaper offices because the legislature felt that the public needed to be informed on Sundays. There is a legitimate and rational justification for all of the exemptions contained in Louisiana Sunday Closing Law that is consistent with providing for the general welfare of the public while enforcing a day of rest and recreation for the vast majority of Louisiana's public.

The legislature simply decided not to exempt hardware stores from the general Sunday shut-down rule. That decision does not render the statute unconstitutional. It is a legislative prerogative to ascertain which stores should and should not be open. So long as that determination by the legislature is not arbitrary or totally unrelated to its stated purpose, the decision is valid and stands any constitutional assault.

As this Honorable Court stated in *Massachusetts v. Morgia*, 427 U.S. 307 (1976):

> "...the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. .. Such action by a legislature is presumed to be valid."

The Louisiana legislature has not acted irrationally in creating its "lines of distinction" and has legitimately and constitutionally exercised its police power.

CONCLUSION

This Honorable Court should deny petitioner's request for a writ of certiorari because it has failed to evidence that the Louisiana Sunday Closing Law (R.S. 51:191 et seq.) is unconstitutional. Petitioner has not substantiated any fact in support of its claim that Harry's Hardware, Inc. has been denied equal protection of the law or has been unlawfully discriminated against.

Harry's Hardware has presented no evidence that most of Louisiana's public businesses are open on Sunday; that most of Louisiana's work force engages in their employment of Sunday; that the majority of its stock is sold by grocery or prescription drug outlets on Sunday or even that if Harry's Hardware were open on Sunday it could lawfully sell a major portion of its stock.

In absence of any evidence to substantiate the above, Harry's Hardware has failed to vindicate its claim of denial of equal protection.

Even if Harry's Hardware were able to substantiate some or all of the above factual conclusions, Louisiana's Sunday Closing Law is constitutional because the means utilized are rationally related to the legitimate state objective sought to be realized.

In absence of the creation of a suspect classification or fundamental interest infringement (neither situation

exists in the case at bar), the mere rationality test is to be applied, and as indicated above, is satisfied by Louisiana's Sunday Closing Law.

Respectfully submitted,

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